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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

E032717

V.

(Super.Ct.No. FRE 3818)

TRAVIS WAYNE BURHOP,

OPINION

Defendant and Appellant.

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. Affirmed.

Donald W. Jordan for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Maxine P. Cutler and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Travis Wayne Burhop (Burhop) and three codefendants, Robert Edward Baldasaro (Baldasaro), Thomas Richard Baugh (Baugh), and Caleb East (East), were charged in the same information with the first degree murder of Giann Carlo Cuccia (count 1; Pen. Code, § 187, subd.(a))¹ and with the attempted willful, deliberate, and premeditated murder of Holly Ann Jarrard (count 2; §§ 664 & 187, subd. (a)). Regarding Burhop, it was further alleged that a principal was armed with a firearm in counts 1 and 2 (§ 12022, subd. (a)), and that Burhop had one prison prior (§ 667.5, subd. (b)).

The four defendants were tried together. Baldasaro, Baugh, and East were tried before the same jury, and Burhop was tried before a separate jury. East entered into a plea agreement during jury deliberations. Baldasaro, Baugh, and Burhop were found guilty as charged. We affirmed the judgments against Baldasaro and Baugh in an unpublished opinion dated August 8, 2003, case number E030906.² In this opinion, we affirm the judgment against Burhop.³

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² We have granted the People's request that we take judicial notice of the record in case number E030906.

³ Burhop was sentenced to 27 years to life: 25 years to life for the murder, a concurrent term of life with the possibility of parole for the attempted murder, plus two years -- one year for the armed enhancement and one year for the prison prior.

Burhop moved for a new trial on four grounds: (1) he was factually innocent of the murder and attempted murder, that is, the evidence was insufficient to support his convictions; (2) the trial court erroneously refused to discharge his retained trial counsel upon his request after the close of the evidence; (3) he was denied the right to testify in his own defense; and (4) his trial counsel rendered ineffective assistance. The motion was denied on each ground, following extensive hearings and the testimony of Burhop's trial counsel, Sheldon Levitin (Levitin).

On this appeal, Burhop contends: (1) he is factually innocent of the murder and attempted murder, that is, there is insufficient evidence to support his convictions; (2) he was denied the right to retained counsel of his choice; (3) he was denied the right to testify in his own defense; (4) he received ineffective assistance of counsel; (5) the trial court improperly admitted against him certain portions of the codefendants' statements made in a police interrogation room outside the officers' presence; and (6) cumulative error requires reversal. We find each contention without merit, and affirm.

FACTS PROCEDURAL HISTORY

A. The Murder and Attempted Murder

Shortly before 3:00 a.m. on Saturday, November 20, 1999, 17-year-old Cuccia and 16-year-old Jarrard were sitting on the porch of a Redlands apartment. Both were staying the night with a friend. A man whom Jarrard later identified as Baldasaro walked up to

the porch and asked for a light. As Cuccia reached into his pocket for a lighter,

Baldasaro started shooting. He fired six or seven shots from a distance of about 12 feet.

Cuccia died from two gunshot wounds to his chest. Jarrard was struck several times, but survived. The People's theory was that Cuccia was shot in a case of mistaken identity. The intended victim was Kenneth Richardson, also known as "Spike." Spike and Cuccia had similar hair. The evidence showed that Burhop paid Baugh to beat up or "take out" Spike, and that Baugh recruited Baldasaro and East to assist him.

B. Spike's Testimony

Spike testified that in September 1998 he used Burhop's money to buy ephedrine pills. Ephedrine is a chemical used in manufacturing methamphetamine. Instead of giving the ephedrine pills to Burhop, Spike sold them for \$2,000. Spike and Burhop later agreed to meet to discuss the matter.

Burhop met Spike at Spike's motel room with "[a]bout ten other guys." Burhop told Spike, "I guess we could fuck you up pretty bad right now," and told Spike he owed him about \$1,400. Burhop took \$200 from Spike, which was all the money Spike had with him. Burhop told Spike he wanted to hear from Spike within a week about the rest of the money.

After the meeting, Spike told "everybody that [he] knew" that he wasn't going to pay Burhop. He "talked a lot of shit," and said things like "I don't think he's got the balls to come find me." He later heard Burhop was looking for him. One night, Burhop

and another man came to Spike's house. Spike pointed a shotgun at them and told them to leave. In early 1999, Spike moved to the apartments where the shooting occurred. He was evicted about one week before the shooting.

About eight months before the shooting, Dennis Roper told Bobby Lindsay, who was a friend of Spike's, that he (Roper) was going to "set up" Spike for Burhop. This meant "set him up for a beating." Lindsay told Spike what Roper said. Roper denied making the statement.

C. Jennifer Pasillas's Testimony

Jennifer Pasillas was Spike's former girlfriend. She testified that one night in November 1998 Burhop was pounding on the front door of their house looking for Spike. Pasillas told Burhop that Spike wasn't home. Burhop told her she was lying and said he was going to break the door down. He then went to a side gate but couldn't get through because it was locked.

D. Richard Hutchinson's Testimony

Richard Hutchinson (Hutchinson) is Baldasaro's brother. Hutchinson testified that he, Baldasaro, and Baugh rode "down the hill" from Hesperia to Redlands in Baugh's BMW on the night of Thursday, November 18, 1999. (As noted, the shooting occurred about 3:00 a.m. on Saturday, November 20.) During the ride, Baugh said "they were going down there to handle someone" or "take him out." Baldasaro had a gun in his hand and said, "Yeah, I got something for that ass." Either Baugh or Baldasaro said the guy

they were going to "take out" owed \$2,000. One of them also said "[t]hey might give us trouble, so we're going to take him out." They asked Hutchinson if he would help them and he said no.

The men drove around all night. As they did so, Baugh made numerous phone calls and stopped to talk to people. Baugh was looking for a guy named Spike and was trying to find out what Spike looked like and where he was. Hutchinson said that Baugh stopped and talked to someone in a red sport utility vehicle. Another witness, Leslie Keating (Keating), identified the same vehicle as belonging to Burhop. Other evidence showed that Burhop rented a red Dodge Durango at 11:00 a.m. on Friday, November 19.

At some point on Friday, November 19, Baldasaro and Baugh went to Keating's apartment. Keating made breakfast and Baugh continued making calls. (Baugh's cellular phone records showed he called Burhop at approximately 2:00 p.m. on November 19.) Baugh and Baldasaro later left, and Hutchinson and Keating smoked some methamphetamine. Hutchinson then fell asleep. After he woke up, Baugh and Baldasaro came back to the apartment with Baugh's girlfriend, Cheyanne Cisneros (Cisneros).

E. Keating's Testimony

Keating testified that Baugh, Baldasaro, and Hutchinson came to her apartment about 3:00 p.m. She said Baldasaro was "waving a gun around" and saying "he would

kill anybody if he had to for his home boy." Baugh said they were going to "tax" someone. She said taxing meant to take personal property or to beat someone.

Baugh and Baldasaro left and said they would be back at 11:00 p.m. While they were gone, Keating said Hutchinson told her that Baugh and Baldasaro told him they were going to do the taxing for Burhop. (Hutchinson denied telling Keating this, or that Baugh or Baldasaro said it.)

About 3:00 or 4:00 a.m. on November 20, Baugh called Keating and asked for Burhop. Keating told him Burhop was not there. Baugh said, "If he gets there, tell him we'll be there soon." At approximately 6:30 a.m., Baugh came back with Baldasaro and East. After that, Burhop called and asked to speak to Baugh. Baugh then spoke to Burhop. After Baugh hung up the phone, he said, "Travis should be here within about five minutes." Burhop then came to Keating's apartment and met privately with Baugh in a hallway. After Burhop left, Baugh gave East some money. Baugh told East, "We'll get more later."

At this time, Keating said that Hutchinson and Cisneros were in the apartment.

One was in the bathroom. It isn't clear where the other one was. She also said Baldasaro was "wacked out" on drugs. She admitted she was a heavy methamphetamine user. She also said that Burhop sold methamphetamine.

F. Cisneros's Testimony

Cisneros testified that Baugh picked her up in Hesperia about 11:00 p.m. on November 19. She said she and Baugh drove "down the hill" with Baldasaro and Hutchinson. They stopped to pick up East. The group then went to Keating's apartment, arriving at approximately 12:00 or 12:30 a.m. on November 20. Twenty or thirty minutes later, Trevor Ray (Ray) arrived.

Cisneros said that Baugh, Baldasaro, and East left Keating's apartment about 1:00 or 1:30 a.m. on November 20. (This was shortly before the shooting occurred about 3:00 a.m.) Cisneros fell asleep on a couch. She woke up about 4:00 or 4:30 a.m. She said Ray then drove her and Hutchinson to East's apartment in an old pickup truck. There, she said she and Hutchinson met Baldasaro and Baugh and went back up the hill to Hesperia.

Cisneros said she did not see Burhop at Keating's apartment that morning. She also said she did not see a gun during the ride down the hill, back up the hill, at Keating's apartment, or at any other time or place on November 19 or 20. Nor did she hear anyone talk about a gun or shooting anyone.

G. Camisha Perez's Testimony

Camisha Perez (Perez) was Burhop's girlfriend and was living with him in November 1999. On the morning of November 20, 1999, she said Burhop got out of bed about 7:30 a.m. and left with Ray to remove some siding from a house they were

remodeling. She did not recall that Burhop received any phone calls during the night or early morning hours of November 20.

H. The Codefendants' Statements Admitted Against Burhop

The trial court admitted against Burhop a portion of a videotaped conversation by and among Baugh, Baldasaro, and East while they were in a police interrogation room and outside the officers' presence. In the portion of the conversation admitted against Burhop, the codefendants discussed their roles in the crimes, who may have "ratted" on them, and the punishment each might receive. They did not mention Burhop nor did they mention receiving payment for the shooting. This evidence was admitted against Burhop to show that the codefendants had committed the charged crimes.

I. Burhop's Defense

None of the defendants testified. Burhop called Stacey Hoak (Hoak). She testified that in the summer of 1999 she was in a bar called Louie's with Burhop and Danny Sair (Sair). She said Sair was telling Burhop that he wanted to find Spike and beat him up because Spike owed money. She said Burhop told Sair to "drop it," that it was "not a big deal," and to "calm down." She did not testify that anyone else was present during this conversation.

Burhop also called Dr. Ari Kalechstein, a clinical psychologist, who opined that Keating's testimony was unreliable. He studied some of Keating's testimony and testified that she suffered from psychological and mental disorders which impaired her

judgment as a result of prolonged methamphetamine use. He questioned her ability to recall and recollect events. He never interviewed nor spoke with Keating, however, and admitted there were other explanations for some of her behavior.

In closing argument, Burhop's counsel noted that Keating was the only witness who connected Burhop to Baugh and the shooting and explained why her testimony was wholly unreliable. He emphasized that Cisneros did not see Burhop at Keating's apartment on the morning after the shooting, and that Perez testified that he was with her. He argued that the purpose of Baugh's phone call to Burhop before he arrived at Keating's apartment was probably to buy methamphetamine. And he explained that Burhop did not testify because Cisneros confirmed he was not at Keating's apartment on the morning after the shooting. (Counsel told the jury in his opening statement that Burhop would "probably" testify.)

DISCUSSION

A. The Trial Court Properly Denied Burhop's Motion for a New Trial Based on Factual Innocence and Insufficient Evidence

Burhop contends the trial court erroneously denied his motion for a new trial because he was "factually innocent" of the murder and attempted murder. More specifically, he argues that the verdicts were contrary to the law and the evidence.

(§ 1181, cl. (6).) He maintains there was no evidence that he solicited or encouraged Baugh to kill or inflict great bodily injury on Spike or anyone else and that the

codefendants' actions were not foreseeable to him. Instead, he says the evidence showed, at most, that he only intended that a simple assault and battery would be committed and that no one was to be seriously injured or killed. We disagree.

The trial court may order a new trial "[w]hen the verdict or finding is contrary to law or evidence " (§ 1181, cl. (6).) Alternatively, the trial court may reduce a conviction to a lesser included offense if it finds the evidence shows the defendant to be not guilty of the convicted offense but guilty of a lesser include offense. (*Ibid.*) In ruling on the motion, the trial court must independently review the evidence, determine its proper weight, and decide whether there is sufficient credible evidence to support the verdict. (*People v. Lewis* (2001) 26 Cal.4th 334, 364.) The trial court has broad discretion in ruling on the motion, and we will not disturb its ruling "absent a manifest and unmistakable abuse of that discretion." (*Ibid.*)

Regarding Burhop's liability for the murder and attempted murder, the jury was properly instructed on the definitions of principals and aiding and abetting (CALJIC Nos. 3.00 and 3.01) and on a principal's liability for the natural and probable consequences of a crime originally aided and abetted (CALJIC No. 3.02). The jury was further instructed on the circumstances under which murder and attempted murder are a natural and probable consequence of an assault by means of force likely to produce great bodily

injury.⁴ And, the jury was also instructed that a simple assault does not require that "any actual injury be inflicted" and that "[g]reat bodily injury refers to significant or substantial bodily injury or damage" (CALJIC Nos. 9.00 & 9.02.)

The evidence showed that: (1) Spike sold Burhop's ephedrine for \$2,000 and owed Burhop money; (2) Burhop was interested in obtaining payment or extracting punishment from Spike; (3) Burhop confronted Spike with a large group of people and threatened him with great bodily injury; (4) Spike pointed a gun at Burhop when Burhop tried to confront him again; (5) Baugh and Baldasaro were going to "tax" or "take out"

⁴ CALJIC NO. 3.02 instructed the jury that, "One who aids and abets another in the commission of a crime [or crimes] is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted. [¶] In order to find a defendant guilty of the crimes of Murder or Attempted Murder, as charged in Counts 1 and 2, under this theory you must be satisfied beyond a reasonable doubt that: [¶] 1. The crime of Assault with Means Likely to Produce Great Bodily Injury was committed or originally intended[;] $[\P]$ 2. That the defendant aided and abetted that crime; $[\P]$ 3. That a co-principal in that crime committed the crimes of Murder and Attempted Murder; and [¶] 4. The crimes of Murder and Attempted Murder were a natural and probable consequence of the commission of the crime of Assault with Means Likely to Produce Great Bodily Injury. [¶] Whether a consequence is 'natural and probable' is an objective test based not on what the defendant actually intended but on what a person of reasonable and ordinary prudence would have expected would be likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural consequence' is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen. [¶] *However*, Murder and Attempted Murder are not a natural and probable consequence of a simple assault or battery, if the defendant did not have knowledge, and did not reasonably foresee, that a co-principal in such an assault or battery would possess a deadly weapon or would utilize means/force likely to produce great bodily injury." (Italics added.) (People v. Prettyman (1996) 14 Cal.4th 248, 267.)

Spike for Burhop; (6) Burhop met with Baugh shortly before the shooting; and (7) Burhop met with Baugh shortly after the shooting and paid Baugh money.

This evidence showed that Burhop solicited and encouraged Baugh to commit an assault by means of force likely to produce great bodily injury, and that the murder and attempted murder were natural and probable consequences of these actions. The evidence also showed that Burhop should have reasonably expected that Baugh would recruit others to assist him and that Baugh or someone in association with him would possess a deadly weapon or use force likely to produce great bodily injury in attempting to "tax" or "take out" Spike.

In finding there was substantial credible evidence to support Burhop's convictions, the trial court reasoned that the evidence showed that Burhop intended, at a minimum, that Spike would be assaulted by means of force likely to produce great bodily injury, if not actually killed, and set in motion a chain of events that foreseeably led to the murder and attempted murder. The trial court did not abuse its discretion.

B. The Trial Court Did Not Deny Burhop the Right to Retained Counsel of His Choice

Burhop contends the trial court denied him his right to retained counsel of his choice, by denying his request to "get a new lawyer" and retry the case after the close of evidence. We disagree. We conclude that Burhop's request was properly denied, both when it was originally made at the close of the evidence and when it was again raised in Burhop's motion for a new trial.

"A criminal defendant . . . has the due process right to appear and defend with retained counsel of his or her choice. [Citations.] . . . [¶] . . . [¶] The right to discharge retained counsel is not absolute, however" (*People v. Lara* (2001) 86 Cal.App.4th 139, 152-153.) The trial court has discretion to deny a motion to discharge retained counsel if it "would result in a "disruption of the orderly processes of justice unreasonable under the circumstances of the particular case."" (*Id.* at p. 153, quoting *People v. Ortiz* (1990) 51 Cal.3d 975, 982.) In other words, "a court faced with a request to substitute retained counsel must balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution." (*People v. Turner* (1992) 7 Cal.App.4th 913, 919.) The request is properly denied where it is untimely and there is no showing that counsel has rendered or will render ineffective assistance. (*People v. Lau* (1986) 177 Cal.App.3d 473, 479.)

During trial and after the close of the evidence, the court conducted an in camera hearing at Burhop's request. Burhop and his trial counsel, Levitin, were present. The prosecutor was not. Burhop told the trial court he had hired the law firm of Miller & Associates and expected to have a "team of lawyers" representing him, not just Levitin. He complained that Miller & Associates had misled him, that Levitin thought he had not been adequately compensated, and that Levitin's performance was inadequate. He told the trial court he would "like to get a new lawyer" and retry the case.

The trial court explained to Burhop that he had a right to discharge his retained counsel "up to a certain point" and did not have to show that his counsel was incompetent. The trial court further explained that because Levitin was doing a good job and trial was nearly complete, "I can't really let you fire Mr. Levitin at this point." The trial court discussed each of Burhop's complaints about Levitin's performance and trial strategy, and explained why Levitin was doing a "very good job." The trial court said it would have granted Burhop's motion if it believed Levitin was not effectively representing Burhop.

Following Burhop's conviction, he made a motion for a new trial on the ground he had been denied his right to retained counsel of his choice. In support of the motion, he submitted declarations and took testimony from Levitin regarding the circumstances surrounding his retention of Miller & Associates and the representations that Levitin and Miller & Associates made to him before trial. The trial court questioned whether the motion was cognizable on this ground. It indicated that the only relevant consideration was whether Burhop had received ineffective assistance of counsel. We agree.

Burhop cites no authority for obtaining a new trial on the ground he was denied the right to retained counsel of his choice. Indeed, granting a new trial on this ground would conflict with the established rule that the only remedy for the denial of the right is per se reversal. (*People v. Ortiz, supra,* 51 Cal.3d at p. 988.) "[A]ny standard short of per se reversal would 'inevitably erode the right itself' [citation]" (*Ibid.*) It is

settled, however, that a motion for a new trial may be made on grounds of ineffective assistance of counsel. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582 [statutory grounds for new trial not exclusive; trial court has duty to see "that the trial is conducted with solicitude for the essential rights of the accused"].)

Where, as here, a motion to discharge counsel is made during trial and is therefore untimely, the only relevant consideration becomes whether the defendant has received effective assistance of counsel. And here, the evidence concerning Miller & Associates's and Levitin's retention -- and their representations to Burhop -- bore minimal, if any, relevance to Burhop's ineffective assistance claim. The evidence also failed to explain or excuse Burhop's failure to move to discharge and replace Levitin before trial.

The evidence showed that Burhop hired Miller & Associates through his father, Russell Burhop, and uncle, Adam Burhop. The firm was chosen due to its "advertised record on murder cases." In December 1999, Russell and Adam Burhop met with attorneys from the firm, including Levitin, Craig Wormley, and Allen Baum. Russell Burhop said that Baum assured him that he, Baum, would be working on the case with Wormley and Levitin. The firm was paid \$75,000 in advance.

A written fee agreement provided that "Client [Travis Burhop] retains Miller and Associates [Law Firm] for representation in Client's legal matter." The agreement also provided that "[i]f the attorney assigned to the case leaves the employ of Miller and Associates while the case is still pending, the case will remain with Miller and Associates

and a new attorney will be assigned." Shortly after the agreement was signed, Craig Wormley wrote a letter to Burhop advising that the firm employed an "aggressive team of highly competent trial attorneys," and that the case had been assigned to Wormley, Levitin, and Hal Cragle as "case manager." Allen Baum was not mentioned.

About one year before trial, Levitin filed motions that listed himself and Miller & Associates as Burhop's attorneys. At the time of trial, Levitin was the only attorney representing Burhop. The Los Angeles Indigent Criminal Defense Attorneys panel had rated Levitin grade "3," meaning he was not considered qualified to defend murder cases.

Russell Burhop averred that about one month before trial, Levitin told him that he and Miller & Associates had had a "parting of the ways," but he was remaining on the case because it was too close to trial for another attorney to take over. Russell then called the firm and was advised that Craig Wormley, Allen Baum, and Hal Cragle were no longer with the firm and there was no one there to talk to him. Russell said that, probably during jury selection, Levitin told him he "didn't get paid anything near what you paid Miller and Associates."

At the hearing on Burhop's motion, Levitin denied making this statement to Russell Burhop. He also said he had been adequately compensated, both because Miller & Associates paid him \$20,000 and because this was the first murder case he had ever defended. He had, however, prosecuted between 150 and 250 murder cases as a district attorney. He thus considered himself competent to defend Burhop.

Levitin further testified that he could not recall that Miller & Associates had given him any assistance in the case. (A defense investigator whom Miller & Associates had not paid assisted Levitin on the case.) When asked whether he and Miller & Associates had come to a parting of the ways, he said it was not an "abrupt end." He also said that he was no longer affiliated with the firm because he deplored "what [he] thought to be the way they mishandled clients, Mr. Burhop being one of that number." He also said he would testify for Burhop in a civil suit against Miller & Associates.

Levitin said he believed Miller & Associates had misled Burhop's family with a "sales pitch" to the effect that the firm would be giving Burhop its full support, when, in fact, Levitin turned out to be the only attorney handling the case. He said he spoke with Burhop about a year before trial concerning Burhop's frustration with Miller & Associates, and then told Burhop that he would be handling the case. During the same conversation, Burhop told Levitin he was satisfied with his representation but felt that Miller & Associates had made misrepresentations.

None of this evidence explained or excused Burhop's failure to seek to discharge Levitin before trial. Instead, it showed that Burhop knew -- about one year before trial -- that Miller & Associates was not assisting with his defense and that Levitin was the only attorney representing him. In view of its untimeliness, the trial court properly denied Burhop's request to discharge his trial counsel both at the in camera hearing and on Burhop's motion for a new trial.

C. Burhop Was Not Deprived of His Right to Testify on His Own Behalf

Burhop contends he was deprived of his right to testify on his own behalf because he was "improperly talked out of it" by his trial counsel, Levitin, and by the trial court during the in camera hearing on his motion to discharge Levitin. We disagree.

A defendant who insists on testifying on his own behalf cannot be deprived of that opportunity, notwithstanding his counsel's advice to the contrary. (*People v. Gray* (1998) 66 Cal.App.4th 973, 987-988, citing *People v. Robles* (1970) 2 Cal.3d 205, 215.) The issue is distinct from whether counsel provided adequate representation. (See *People v. Frierson* (1985) 39 Cal.3d 803, 812.)

As discussed above, Burhop told the trial court during the in camera hearing on his motion to discharge Levitin that he wanted to testify on his own behalf and believed Levitin had not done a good job defending him. He was also worried that Levitin had told the jury during his opening statement that Burhop would testify but did not call Burhop to the stand.

During the in camera hearing, the trial court and Levitin discussed with Burhop the various advantages and disadvantages of him testifying -- including the risk that he would be impeached with his prior conviction for assault with a deadly weapon and the advantage of relying on Cisneros's favorable testimony and Keating's impeachment.

Levitin said, "At the time that I first appraised this case and made a determination that I was going to recommend to Mr. Burhop that he take the witness stand . . . we did not

have any information whatsoever about [Cisneros], and as well I had no idea that [Keating] was going to be so thoroughly impeached. And I believe at this moment her credibility is virtually zero, if not zero. With those two matters in the court's record and the ability to refer to them during argument, it's my belief that he need not testify"

The trial court then told Burhop in no uncertain terms that he had a right to testify on his own behalf and that no one would prevent him from testifying. The trial court told Burhop he should discuss the matter further with Levitin, and if after that discussion he still wished to testify, he could. Burhop then said, "I don't even want to testify now that it's been explained [¶] [¶] After he's explained everything to me about why I shouldn't [testify] . . . I understand what he's saying. And I agree with it. . . ."

Thus, the record is clear that Burhop was not deprived of his right to testify. He made an informed decision not to testify, after discussing the matter with the trial court and his counsel.

D. Burhop Has Not Shown that His Trial Counsel Rendered Ineffective Assistance

Burhop contends his trial counsel, Levitin, rendered ineffective assistance in many respects, and that the trial court erred in denying his motion for a new trial on this ground. He argues that Levitin was unfamiliar with the facts, failed to adequately prepare for trial, was ineffective in questioning or cross-examining witnesses, and employed an ineffective trial strategy. He specifically argues that the only effective trial strategy would have been to call him to testify in his own defense, and that Levitin was

also ineffective for failing to introduce the codefendants' "complete" statements to police.

We conclude Burhop has failed to establish his ineffective assistance claim. We first set forth the applicable law and explain that Levitin competently executed a sound trial strategy. We then address the specifics of Burhop's ineffective assistance claims. These include Burhop's argument that he should have been called to testify in his own defense and that his trial counsel should have sought to admit the codefendants' statements to police. He claims that his testimony and the codefendants' "complete" statements would have shown that a simple assault was all that was intended.

1. The Applicable Law

"To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' [Citations.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 366.)

"Because after a conviction it is all too easy to criticize defense counsel and claim ineffective assistance, a court must eliminate the distorting effects of hindsight by indulging 'a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citations.]' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 158.) And, "[i]f a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient." (*People v. Kipp, supra,* 18 Cal.4th at p. 366.)

Claims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding, because the record on appeal is often inadequate to assess the reasons for counsel's actions. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) "If 'the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation."" (*People v. McDermott* (2002) 28 Cal.4th 946, 988.) And, where the record reveals the reasons for counsel's actions, the merits of an ineffective assistance may be assessed on appeal. (*People v. Mendoza Tello, supra,* at pp. 267-268.)

2. <u>Levitin's Trial Strategy</u>

Levitin testified that he was a former district attorney and had prosecuted between 150 and 250 murder trials. He had never before defended a murder trial but believed he was competent to do so. His "theme" for defending Burhop was to emphasize the lack of

evidence that Burhop solicited or encouraged Baugh to seek retribution from Spike. The record shows that Levitin competently executed this strategy and that it was sound, particularly in view of the available alternatives.

Keating was the main witness who directly tied Burhop to the crimes. She testified that Burhop came to her apartment on Saturday morning, a few hours after the shooting, briefly met with Baugh, and that Baugh then gave East some money. Levitin viewed Keating as highly impeachable, based on her long-time methamphetamine use and her admitted use at the time of Burhop's alleged meeting with Baugh. He thoroughly cross-examined Keating regarding her ability to recollect the events of Saturday morning. He also called Dr. Kalechstein, who testified that Keating's testimony was unreliable. Similarly, he discredited Spike by showing that his heavy methamphetamine use made him paranoid and prone to exaggeration. He also discredited Hutchinson by showing that his heavy drug use made him hear and see things. During closing argument, he emphasized that Keating, Spike, and Hutchinson were not credible, and that Cisneros—who testified she had not been using drugs—did not see Burhop at Keating's apartment on the morning of the shooting.

3. <u>Burhop's Proffered Testimony</u>

Burhop principally argues that Levitin was ineffective for failing to call him to testify. He maintains his testimony would have established that he did not solicit or encourage Baugh's or the other defendants' actions but, at most, encouraged Baugh to

commit a simple assault and battery. He would have testified that sometime before the shooting, he told Sair *and Baugh* at Louie's bar that, if they were going to tax Spike, to "rough him up for me, too," or to "get in a few licks" for him. This, he argues, would have shown that the charged crimes were not a natural and probable consequence of his actions, because he only encouraged Baugh to commit a simple assault, not an assault by means of force likely to produce great bodily injury or murder. (CALJIC No. 3.02.) We disagree.

Hoak was the only witness who testified about the events in Louie's bar, and Hoak did not testify that Baugh was present in the bar. Hoak also said that when Sair told Burhop he wanted to beat up Spike, Burhop told Sair to "calm down" and "drop it" because it wasn't worth it. This testimony was favorable to Burhop, but Burhop's testimony would have flatly contradicted it. Indeed, Burhop's testimony would have provided the only direct evidence that Burhop encouraged Baugh to assault Spike.

Additionally, as Levitin explained, the prosecutor could have used Burhop's "rather [milquetoast] statement" in Louie's bar to show that Burhop instructed Baugh to commit an assault by means of force likely to produce great bodily injury. Other evidence showed that Burhop had a motive to cause Baugh to inflict great bodily injury on Spike. Burhop had confronted Spike with "about ten other guys" and threatened him with great bodily injury. Burhop also had reason to believe that further confrontations with Spike would be violent. Spike once pointed a gun at Burhop when Burhop

confronted him. Had Burhop testified that he told Baugh to "get in a few licks" for him, the jury would have had ample reason to infer that Burhop instructed Baugh to commit an assault on Spike by means of force likely to produce great bodily injury, and that the murder and attempted murder were natural and probable consequences of these actions.

Additionally, as the trial court noted, if Burhop had testified he probably would have been forced to admit he met with Baugh the morning after the shooting and gave him money. Burhop may have also been forced to admit that he helped Baugh dispose of the murder weapon in Big Bear Lake -- evidence the jury never heard. Burhop also had a prior conviction for assault with a deadly weapon (§ 245, subd. (a)(1)) which could have been used to impeach him.

In sum, Burhop's testimony would have revealed more inculpatory evidence and thus posed significant risks to his defense. Under these circumstances, Burhop has not shown that Levitin rendered ineffective assistance by failing to call him to testify.

Burhop argues that Levitin was also ineffective because he told the jury during opening argument that Burhop would "probably" testify. Levitin explained his change of tactics because as the trial progressed he realized that the district attorney was highly competent and would have used Burhop's prior "to full effect." Burhop argues that Levitin's explanation "strains credulity." In any event, Burhop has not shown that Levitin's action was prejudicial. In closing argument, Levitin explained that Burhop did not testify because there was nothing for him to refute; Keating was not credible and

Cisneros said he was not at Keating's apartment. Additionally, the jury was told not to draw any inferences from Burhop's failure to testify and that Burhop had a right to rely on the prosecution's failure of proof. (CALJIC Nos. 2.60 & 2.61.)

Burhop's claim that Levitin should have called him to testify judges Levitin's action in the "harsh light of hindsight." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) We will not second-guess Levitin's alternative strategy, because it was reasonable under the circumstances known at the time of trial. (*Ibid.*)

4. The Codefendants' "Complete" Statements

Burhop further argues that Levitin was ineffective because he did not seek to admit the codefendants' "complete statements" to police. He argues the statements would have shown he only intended to inflict a simple assault or battery and had no reason to believe Baugh would be armed or use force likely to produce great bodily injury. He relies on *Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997 (*Chia*), where the Ninth Circuit held that a defendant, Chia, was denied a fair trial because the trial court refused to admit his alleged coconspirator's exculpatory statements that he, Chia, was not involved in a conspiracy to rob and kill two persons. *Chia* is distinguishable, however, because here the codefendants' statements would not have aided Burhop's defense.

Instead, the statements would have provided direct evidence that Burhop solicited Baugh to assault Spike and that Burhop reasonably expected that Baugh would seek assistance from others and would use force likely to produce great bodily injury.

The codefendants' "complete" statements to police showed, according to Burhop's summary, that the codefendants "had gone to 'beat some dude [named Spike] down'"; that "it wasn't supposed to go down like [it did]"; that "Burhop had let the word out that whoever wanted to could make some money 'on it'"; that "Burhop offered \$300 apiece to them"; that "Burhop from a different vehicle had pointed out [Spike's] house and had given Spike's description to Baugh"; that "Baugh said that Burhop set the whole thing up"; that "probably a month before the shooting Burhop told Baugh that, if Baugh wanted to make some extra money, Baugh and a couple of friends could 'stomp [Spike] out"; that "Burhop said that [Spike] 'needs a bumping'"; that "Burhop said that Spike possibly carried a [nine-millimeter] but that he was a coward"; that "at first Baugh declined but when Burhop asked him a second time a couple of weeks later Baugh said he would"; that "Burhop had told Baugh that he would pay Baugh as soon as Burhop hears that Spike 'got his fucking ass whipped'"; and that "when Baugh asked Burhop if he could make some quick cash, Burhop mentioned a guy who burned him on pills who needs to be shot in the leg or beat up or something."

Indeed, the codefendants' statements may have shown that Burhop did not intend that Spike would be killed. But they also showed that Burhop was very much involved in soliciting Baugh to commit an assault and battery on Spike by means of force likely to produce great bodily injury. The foreseeable consequences of this conduct included someone getting shot and possibly killed. As such, the codefendants' statements would

have further supported Burhop's convictions for the murder and attempted murder. (*People v. Prettyman, supra,* 14 Cal.4th at p. 262.)

5. <u>Burhop's Remaining Ineffective Assistance Claims</u>

Burhop argues that Levitin was incompetent because he asked Perez, Burhop's girlfriend, whether she recalled "anything unusual or out of the ordinary about that night of November 20th of 1999." He notes that the night of November 20 was the night *after* the shooting, and argues that Levitin should have asked Perez about the night of Friday, November 19. Burhop has not shown how Levitin's failure to ask Perez about the night of November 19 prejudiced him, and we discern no prejudice. Perez said that she and Burhop went to see a movie on the night of November 19. She also said Burhop was with her until about 7:30 a.m. on the morning of November 20. And she did not recall Burhop receiving any calls during the early morning hours of November 20.

Lastly, Burhop complains that Levitin was unable to find Dr. Kalechstein's curriculum vitae in his file when the prosecutor asked for a copy; that Levitin didn't recall that a police officer had made a report about stopping Burhop in his truck a couple of weeks after the shooting; that Levitin "had not reviewed (or could not remember having reviewed) telephone records which had been received several days earlier," and that Levitin had "minimal notes" covering only two interviews with Burhop. We discern no prejudice from any of these events. Additionally, we note that Levitin testified that all but 10 pages of his notes were destroyed by a computer virus.

E. The Codefendants' Redacted Statements Were Properly Admitted Against Burhop

Burhop contends the trial court erroneously admitted against him a portion of the statements made by and among the codefendants, Baugh, Baldasaro, and East, while they were being videotaped in a police interrogation room outside the officers' presence. He argues that these statements were inadmissible, both because they were coerced and because they violated his Sixth Amendment right to confrontation. We disagree with both contentions.

The codefendants' redacted videotaped conversation that was played to Burhop's jury consisted of 15 transcribed pages. In this portion of their conversation, the codefendants did not mention Burhop, nor did they mention receiving any money from anyone for the shooting. All references to Burhop and to the payment of money were redacted. Burhop's jury only heard the codefendants discuss their respective roles in the shooting, who they thought had "ratted" on them, and the punishment each expected to receive.

The trial court ruled that the codefendants' redacted statements were admissible, because the prosecution's theory was that Burhop "expressly or implicitly hired and paid" the codefendants to "attack" Spike. The trial court noted that the codefendants' involvement in the shooting would "probably be the first thing that the jury would have to find to even reach the issue of whether or not Mr. Burhop was responsible for that" Accordingly, the trial court admitted the redacted statements for the purpose of

showing that the crime of assault by means of force likely to produce great bodily injury was committed or originally intended. (CALJIC No. 3.02.)

1. Voluntariness

Burhop first argues that the statements were inadmissible against him because they were involuntary. We disagree. In upholding Baugh's and Baldasaro's convictions, we concluded that the same statements were admissible against Baugh and Baldasaro, because they were not the functional equivalent of an interrogation and were voluntary. (*People v. Baldasaro et al.* (August 8, 2003, E030906) [nonpub. opn.], pp. 15-22.) We reasoned that the codefendants were no longer under interrogation when they made the statements. Instead, the officers had concluded their questioning and left the codefendants alone in the interview room. There, they freely chose to speak about their respective roles in the murder and attempted murder. (*Id.* at p. 18.) For the same reasons, we reject Burhop's identical claim. (*People v. Jenkins* (2000) 22 Cal.4th 900, 965-967 [defendant has standing to challenge admission of third party statements made unreliable by coercion].)

2. Confrontation

Burhop further contends that the admission of the codefendants' statements against him violated his Sixth Amendment right to confrontation. He correctly notes that our Supreme Court's recent decision in *Crawford v. Washington* (2004) __ U. S. __ [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) has markedly changed confrontation clause

analysis. But as we shall explain, the codefendants' statements were admissible under *Crawford* because (1) they were not "testimonial" and (2) were declarations against the codefendants' interests. (Evid. Code, § 1230.)

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Before *Crawford*, an unavailable witness's out-of-court statement against a criminal defendant was admissible, if it bore "adequate indicia of reliability." This test was met if the statement fell within a "firmly rooted hearsay exception," or bore "particularized guarantees of trustworthiness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S.Ct. 2531, 65 L.Ed.2d 597] (*Roberts*).)

The *Crawford* court held that "testimonial" statements of an unavailable witness violate the confrontation clause, unless the defendant has had a prior opportunity to cross-examine the declarant. (*Crawford, supra,* 158 L.Ed.2d at p. 194.) Thus, confrontation is the only indicium of reliability that satisfies the confrontation clause. Regarding the *Roberts* test, the high court expressed concern that "[r]eliability is an amorphous, if not entirely subjective, concept" (*Crawford, supra,* at p. 200) and that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation" (*id.* at p. 199).

The *Crawford* court reasoned that the *Roberts* test was both too narrow and too broad: it was too broad because it applied "whether or not the hearsay consists of *ex*

parte testimony." (*Crawford, supra,* 158 L.Ed.2d at p. 198.) And it was too narrow because it admitted "*ex parte* testimony upon a mere finding of reliability. . . ." (*Ibid.*) The court reasoned that the "core concern" of the confrontation clause is testimonial hearsay, and that not all hearsay implicates the confrontation clause. (*Id.* at pp. 192, 194 & 198.)

Notably, the court did not "definitively resolve" whether the confrontation clause applies solely to testimonial statements, leaving the remainder, that is, all nontestimonial hearsay, to regulation by hearsay law. (*Crawford, supra,* 158 L.Ed.2d at pp. 198-199.) Nor did the court fully resolve what constitutes nontestimonial hearsay. But the court strongly indicated that with few exceptions, nontestimonial hearsay does not implicate the confrontation clause. (*Id.* at pp. 192-193.)

The court explained that the confrontation clause is concerned with "witnesses" who "bear testimony," and that "[t]estimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' [Citation.] An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Crawford, supra,* 158 L.Ed.2d at p. 192.)

The court further explained that "[v]arious formulations of this core class of 'testimonial' statements exist: 'ex parte in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the

defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially' [citation], 'extrajudicial statements . . . contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions' [citation]; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]' [Citation.]" (Crawford, supra, 158 L.Ed.2d at p. 193, second italics added.)

The court explained that "[t]hese formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify [as testimonial] under any definition -- for example, *ex parte* testimony at a preliminary hearing. [¶] Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." (*Crawford, supra,* 158 L.Ed.2d at p. 193.)

Here, we must determine whether the codefendants' out-of-court statements were testimonial. In view of the circumstances under which the statements were made, we conclude they were not. The statements were not solemn declarations or affirmations made *for the purpose* of establishing some fact. (*Crawford, supra,* 158 L.Ed.2d at p.

⁵ The statement at issue in *Crawford* was testimonial because it was given to the police by the defendant's wife during a custodial interrogation. (*Crawford, supra,* 158 L.Ed.2d at p. 201.)

192.) Nor were they made under circumstances under which the codefendants would have reasonably believed they would be available for use at a later trial. (*Id.* at p. 193.)

As we previously ruled in case number E030906, the statements were not the product of a police interrogation and were voluntary. Indeed, based on the content and tenor of the codefendants' entire conversation, the codefendants appeared completely unaware that their statements were being videotaped or that they might be used in any later court proceeding. The statements were like the "casual remark to an acquaintance" that the *Crawford* court cited as an example of a nontestimonial statement. (*Crawford*, *supra*, 158 L.Ed.2d at p. 192.) Thus, the codefendants' statements were nontestimonial and their admission did not violate the confrontation clause.

Burhop argues that the admission of the codefendants' statements violated his right to confrontation, because if the codefendants' had been subjected to cross-examination, it would have been revealed that they had "all repeatedly disavowed that the [sic] anything more serious than being 'beaten up' was planned," and that "no serious injury or use of weapons was . . . contemplated." This argument fails because, as we have explained, the codefendants were not witnesses bearing testimony against Burhop. For this reason, the admission of the codefendants' statements did not violate Burhop's right to confrontation.

3. Evidence Code Section 1230

The question remains whether the codefendants' statements were admissible against Burhop under any exception to the hearsay rule. The statements were plainly hearsay, because they were out-of-court statements offered to prove the truth of the matters asserted, that is, the codefendants' involvement in the shooting. (Evid. Code, § 1200, subd. (a).) Unless the statements fall within an exception to the general rule, they were inadmissible. (*Id.* at subd. (b); *People v. Duarte* (2000) 24 Cal.4th 603, 610.)

We conclude that the statements were admissible as declarations against the codefendants' interests. (Evid. Code, § 1230.) Only statements that are "specifically disserving" to a declarant's interest are admissible under this exception to the hearsay rule. (*People v. Duarte, supra,* 24 Cal.4th at p. 612, citing *People v. Leach* (1975) 15 Cal.3d 419, 441.) Such statements must be considered in context to determine whether they are truly inculpatory or attempt to shift blame or curry favor. (*People v. Duarte, supra,* at pp. 611-612.)

But here, no portion of the statements was self-serving or attempted to shift blame to Burhop or anyone else. To be sure, the statements did not implicate Burhop in any way. Instead, the statements consisted of the codefendants' discussing their roles in the shooting, who may have "ratted on them," and the punishment each might receive. And, the statements were admitted for the sole purpose of showing that the codefendants

committed or intended to commit an assault by means of force likely to produce great bodily injury. (CALJIC No. 3.02.)

Burhop notes that at the end of the codefendants' statements, Baugh said, "There's [sic] only two people that knew other than us right here." Burhop argues that this particular statement was inadmissible because it was self-serving and attempted to shift blame to Burhop or others. (*People v. Duarte, supra,* 24 Cal.4th at pp. 610-612.) We disagree. Viewed in context, the statement is a declaration against the codefendants' interests.

The context of the statement shows that Baugh was talking about "two other people" who knew the identity of the shooter. Just before Baugh made the statement, he said his mother was angry with him because the police were saying that he, Baugh, was the shooter. Baldasaro said, "Really?" and East said, "That's what everybody thought." Baugh responded, "I know. That's what they were supposed to think." Baldasaro said, "Until fucking somebody said, [Baldasaro] did it." Baugh then said, "There's only two people that knew other than us right here."

Earlier in the conversation, the codefendants discussed and acknowledged that Baldasaro was the shooter. They also discussed who may have "ratted on them" and named several suspects, but not Burhop or Ray. Thus, the statement was a declaration against interest. (Evid. Code, § 1230.) Specifically, it was an admission that the codefendants knew Baldasaro was the shooter because they were involved in the

shooting. There is no indication that the statement was designed to inculpate or shift blame to any other persons. Rather, the context of the statement shows that Baugh was referring to two of the suspected "rats," which did not include Burhop or Ray.

Although Evidence Code section 1230 is not a "firmly rooted exception" to the hearsay rule (*Lilly v. Virginia* (1999) 527 U.S. 116, 124-125, 134 [119 S.Ct. 1887, 144 L.Ed.2d 117]), it need not be. Under *Crawford*, nontestimonial hearsay is generally subject to regulation by hearsay law, not the confrontation clause. (*Crawford, supra*, 158 L.Ed.2d at pp. 198-199.) And, although *Crawford's* general rule may be subject to exceptions, we discern none applicable here.

F. There Was No Cumulative Error

Because we have found no error on any of the grounds asserted, we do not consider Burhop's final argument that his convictions must be reversed based on cumulative error. (*People v. Ray* (1996) 13 Cal.4th 313, 362.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

		/s/ King	J.
We concur:			
/s/ Hollenhorst	ting P.J.		
/s/ McKinster			